

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL REVISION APPLICATION No. 241 of 1993****For Approval and Signature:****HON'BLE MR.JUSTICE C.K.BUCH**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

DEEPAK MANEKLAL PATEL - Applicant(s)**Versus****NATWARBHAI SOMABHAI PATEL & 2 - Respondent(s)****Appearance :**

MR BHARAT T RAO for Petitioner No(s).: 1.

None for Respondent No(s).: 1.

MR UA TRIVEDI for Respondent No(s).: 2.

MR LR PUJARI, LD.APP for Respondent No(s).: 3.

CORAM : HON'BLE MR.JUSTICE C.K.BUCH**Date : 30/06/2005****ORAL JUDGMENT**

1. The present Revision Application is directed against the order dated 29th March, 1993 passed by the ld.Metropolitan Magistrate, Ahmedabad, allowing the application filed by the respondents-

accused persons praying for discharge for the offence punishable under Sections 405 and 406 of the Indian Penal Code.

2. The petitioner is the orig.complainant and at the relevant point of time, he was Provident Fund Inspector serving in the office of the Regional Provident Fund Commissioner, Ahmedabad. The petitioner had filed a complaint for the offence punishable under Sections 405 and 406 of the Indian Penal Code, on the ground that the respondent-accused had failed to obtain necessary sanction of Central Provident Fund Commissioner under Section 14(a-c) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short 'the Act'). Undisputedly, the accused persons being employers were supposed to deposit the amount of Provident Fund deducted from the salaries of their employees and also their contribution to the said Fund. The allegation against the accused in the complaint is that the accused failed to deposit the amount of contribution in the Employees Provident Fund within the prescribed time limit. In such a situation, the accused were under obligation to obtain necessary permission/sanction from the Provident Fund Commissioner and they had not even obtained the said permission. So the amount retained by them beyond the period prescribed can be said to be a period of temporary misappropriation of the amount of Provident Fund collected by them from the salaries of the respective employees. It can be said that they

have retained the amount unauthorisedly and this unauthorised retention can be equated with misappropriation amounting to breach of trust withing the meaning of Sections 405 and 406 of the Indian Penal Code.

3. Undisputedly, in such a fact situation, as argued by Mr.U.A. Trivedi, learned counsel appearing for the respondents-accused, three options were there that on paying interest, either voluntarily or on demand for the period of retention of the amount beyond the period prescribed and for that period, he has drawn my attention to Section 7-Q of the Act and according to Mr.Trivedi, the mode of recovery of amount of interest is also provided in one of the Sections i.e. Section 8, of the Act. The second alternative was that the respondents-accused could have been asked to pay penalty for not paying the amount deducted from the salary to the Provident Fund as per the scheme of Section (part) 32-A under the Act. This penalty is also addressed as 'damages'. The third alternative was to prosecute the respondents-accused under Section 14(1) of the Act. It would be beneficial to quote relevant part Section 14, which is as under :

“Section 14. Penalties.--(1) Whoever, for the purpose of avoiding any payment to be made by himself under this Act or of enabling any other person to avoid such payment knowingly makes or causes to be made any false statement or false representation shall be

punishable with imprisonment for a term which may extend to one year or with fine of five thousand rupees, or with both.

1(A). An employer who contravenes, or makes default in complying with, the provisions of Section 6 or clause (a) of sub-section (3) of Section 17 in so far as it relates to the payment of inspection charges, or paragraph 38 of the Scheme in so far as it relates to the payment of administrative charges, shall be punishable with imprisonment for a term which may extend to three years but -

(a) which shall not be less than one year and a fine of ten thousand rupees in case of default in payment of employees' contribution which has been deducted by the employer from the employees' wages;

(b) which shall not be less than six months and a fine of five thousand rupees in any other case;

Provided that the court may, for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a lesser term."

4.The submission of Mr.U.A. Trivedi, learned counsel appearing for the respondents-accused, is that the

order discharging the respondents-accused should be held valid and legal because no error in the eye of law can be said to have been committed by the learned Magistrate and the complainant-Inspector ought to have approached the Provident Fund Commissioner for necessary sanction to institute a criminal complaint under the scheme of above referred Section 14(1) of the Act.

5.In the present case, the complainant has kept the authority i.e. Provident Fund Commissioner in the backside of the litigation with the reasons best known to him and filed criminal complaint in the capacity of a private complaintant. It is true that technically it can be said that not depositing the amount deducted, if retained by the employer, then this conduct is nothing but a breach of trust or a misappropriation but no statutory officer should be permitted to institute a private complaint and it should be insisted by the Court that for such prosecution also the complainant should produce a sanction to prosecute the accused from the Provident Fund Commissioner, otherwise such an officer may be tempted to exercise these powers to prosecute colourably and probably he may attempt to blackmail the defaulter, "failed in depositing the same for once or twice".

6.In support of this submission, Mr.U.A. Trivedi, learned counsel appearing for the respondents-accused, has placed reliance on one decision in the case of ***Yashwantrao Dattaji Chowgule and ors. v.***

State, reported in 1993 (1) Crimes 534 (Bombay High Court). This decision has been referred to by the ld.Magistrate, Court No.20, Ahmedabad, in the order under challenge. It is true that the ratio of the decision of the Bombay High Court has persuasive value in federal structure under our Constitution. Consistency in judicial pronouncement, as far as possible, requires to be maintained and unless the Court is able to assign compelling reasons, the Courts should follow decision of the other High Courts, only then the consistency in judicial pronouncement throughout the country can emerge and can provide more strength to the trust of the people approaching the Courts to get their grievance redressed. I would like to quote the relevant part of the said decision, which is as under :

"6. The submissions of Shri Bhobe appear to be correct and deserve acceptance while on the contrary it is difficult to accede to the petitioners learned counsel's submissions advanced on their behalf. A bare perusal of the complaint shows that the same reveals that the petitioners are being prosecuted on account some delay in depositing the sums deducted from the employees of the Company along with the share of Provident Fund contribution and Family Pension Fund contribution. The record shows a statement of the Accountant Ratnakar Naik who says also that the petitioner's Company effected the the payment of th salaries of their employees

in respect of the month of October, 1988 on or about 7th November, 1988 at which time the statutory deductions were made but ultimately deposited the sums deducted along with their contributions towards the scheme of provident Fund and Family Pension Fund only on 30.11.1988 i.e. on the very day the complaint was lodged. It is true that apparently there was thus a delay of about 15 days only incurred by the petitioners in making the deposit of the money due to the employees of the firm. It is also true that the charge-sheet is conspicuously silent as to the correct details of the alleged offence. But the fact remains that from an overall assessment of the evidence recorded by the Investigating Officer during the investigation on the strength of the complaint dated 30.11.1988, it seems easy to conclude that anyone would be in a comfortable position to understand the real meaning of the contents of the charge-sheet and become aware of the actual facts on which the prosecution launched against them rests. Being so it is obvious that the mere fact of the charge-sheet being deficient in nature and silent on certain material details of the alleged offence becomes totally irrelevant if one is not tempted to succumb to the tendency of subscribing an exaggerated technical approach on such matters specially when it deals with sins of omission and commission involving criminal

offences. I am therefore inclined to hold that it is not permissible for me in the facts and circumstances of the case to embark in such dry exercise and therefore, in my view the entire line of arguments of Shri Kakodkar in this regard to be summarily discarded.

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10. There seems to be a very valid point on the submissions of the learned counsel in this regard. Indeed the entire scheme of the Act appears to be aimed at ensuring the recovery of the sums due by the employers to the accounts of their employees in respect of the cuts and deductions effected by them on their salaries towards the payment of the Provident Fund and Family Pension Scheme. Section 14-B which by itself can be construed to a certain extent as a penal provision or at least having a penal character is clear in this respect. In addition the Act provides also for other remedies imposing directly criminal liabilities to the errant employers under Section 14-A and Section 14(2-A) of the Act as well as Para-76 of the Scheme which are also pointers towards that goal. Further and as rightly submitted by Shri Kakodkar Section 14-AC appears to be a provision enacted to expressly protect the bonafide employer who has involuntarily committed default in payment or deposit of his dues. Therefore, it is reasonable to

infer that if the Act itself has provided expressly for a sanction or permission to be obtained by the Inspector from the Commissioner in all cases of purported offences committed by the employers under the Act prior to their protection is to be extended to the employer also in case the offence under which he is to be prosecuted is the one envisaged and punishable under Section 406 of I.P.C.. There is no reason as to why this should not be so. To be noted that such penal liability of the employer is sought to be enforced on account of certain commissioner or omissions purportedly done by the employers under provisions of the Act.

11. *Shri Dhobe in all fairness has also submitted that although apparently for the prosecution of offences under the Act sanction of the Commissioner is necessary while for the prosecution of the offences under Section 406 of the I.P.C., no restriction imposed by law, however, it appears that in the fitness of things the protection ensured by Section 14-AC should be available for the employers also in case of their prosecution under Section 406 of the I.P.C.*

12. *I am, therefore, satisfied that even in case of prosecution of the prosecution of the petitioners under Section 406 I.P.C., a prior sanction of the Commissioner is necessary and required under the scheme of the Act in view of the*

fact that such prosecution is sought to be launched on account of their failure or default in complying with their obligations in terms of the Act."

7. So the gist of the decision is that ***prior permission of the Provident Fund Commissioner is required for the Provident Fund Inspector to lodge prosecution against the employer for the offence punishable under Section 406 of the Indian Penal Code*** (emphasis applied for present judgment). Otherwise every Inspector ignoring the provisions of the special statute may go for prosecution witnesses under Indian Penal Code or other general law. It is very likely that the complainant in a mood to help the accused defaulters may go for prosecution under Section 406 of the Indian Penal Code because the intention or mens rea shall have to be established by the Public Prosecutor and the Court may insist for stricter proof from the prosecution under a special law. When the prosecution is possibly under a special law and scheme then avoiding that type of prosecution, an independent prosecution which can be said to be a private complaint or individual prosecution should not be encouraged because it is likely that it may give rise to a formal police case as has happened in the case on hand.

8. I am in agreement with the ratio propounded by the Bombay High Court and, therefore, I do not find any need to disturb any finding recorded by the learned Magistrate.

9. In view of the above, I do not find any merit in this Revision Application. On the contrary, the department should ask explanation from the complainant as to why he has opted such a route to prosecute the employee for whom more effective prosecution could have been instituted under Section 451 of the Code of Criminal Procedure, 1973. Thus, the present Revision Application stands hereby dismissed. Notice is discharged.

(C.K. Buch, J)

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